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No. 95-47

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995.

THE CLASS OF 48 + 1 AND THE INTERVENOR PLAINTIFFS,
Petitioners,

v.

MILTON GREENBLATT, M.D., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION

SCOTT HARSHBARGER
Attorney General
of Massachusetts

WILLIAM L. PARDEE*
Assistant Attorney General
200 Portland Street
Boston, MA 02114
(617) 727-2200

**Counsel of Record*

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Parties to the Proceeding.

The petitioners' list of parties to the proceeding is inaccurate in the following respects.

Of the seven "Intervenor Plaintiffs," only two are residents at the Treatment Center. They are Albert Gagne and Calvin Tate. The five remaining intervenor plaintiffs were transferred or discharged prior to 1993.

The "Class of 48 + 1" consists of 49 residents (one of whom is deceased) who are opposed to the defendants' motion to modify the decrees. The 49 residents have not been certified as a class, and do not appear in a representative capacity. None of the 49 residents is a party to the *King* case or the decrees therein, but three of them, Dennis J. Quintal, Sr., Robert E. Cameron, and Roger A. Gosselin (deceased), are listed in the docket as "interested parties". Certain of these residents have recently filed motions or requests to "withdraw" from the "class", though they apparently continue to oppose modification of the decrees.

Three additional residents, Ronald J. DeWolfe, William F. Gonsalves, and Larry Davis, have appeared in these proceedings *pro se*, but filed no brief or other papers in the Court of Appeals. Like the 49 residents, these three are not parties in the *King* case but are listed as "interested parties".

The petitioners list "all present or future civilly committed patients at the Treatment Center who stand as successors in interest to the original plaintiff in this matter, Mitchell G. King." Other than Albert Gagne and Calvin Tate, no other resident stands as "successor in interest" to the original

plaintiff in any sense that would support this Court's jurisdiction. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430 (1976). *See also* F.R. Civ. P. 25.

Neither the Commonwealth of Massachusetts nor its agencies, including the Department of Correction, is a party to this proceeding. *See* U.S. Const., Amendment XI.

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BRIEF IN OPPOSITION TO THE PETITION

Statutes Involved.

As in effect in June 1974, when the consent decrees were entered, chapter 123A, section 2 of the General Laws of Massachusetts provided in part as follows:

> The commissioner of mental health shall establish and maintain, subject to the jurisdiction of the department of mental health, a treatment center . . . at a correctional institution approved

> by the commissioner of correction, for the care, custody, treatment and rehabilitation of persons described in section one. The commissioner of correction shall appoint such custodial personnel as may be required for such center. Such custodial personnel shall be subject to the control of the commissioner of mental health with respect to the care, treatment and rehabilitation of persons in their custody, but shall at all times be under the administrative, operational and disciplinary control of the commissioner of correction. The commissioner of mental health shall appoint to such center, in addition to the personnel appointed by the commissioner of correction, adequate personnel for the care, treatment and rehabilitation of such persons committed to their care.

On January 14, 1994, the Massachusetts Legislature enacted St. 1993, c. 489. Among other provisions, chapter 489, § 2, replaced section 2 of chapter 123A of the General Laws with a new section 2:

> The commissioner of correction shall maintain subject to the jurisdiction of the department of correction a treatment program or branch thereof at a correctional institution for the care, custody, treatment and rehabilitation of persons adjudicated as being sexually dangerous. . . . The commissioner of correction shall appoint a chief administrative officer who shall have responsibility for providing personnel with respect to the treatment and rehabilitation of the sexually dangerous persons, consistent with public safety. The commissioner of correction

shall have the authority to promulgate regulations consistent with the provisions of this chapter.

Statement of the Case.

The decree in issue was entered in 1974 with the consent of the parties. A substantially identical decree was entered at about the same time in a parallel action, *Williams v. Lesiak*, C.A. No. 72-571.[1] Subsequent supplemental decrees entered in each case are not in issue here. The petitioners, citing stipulations and evidence heard by the district court, allege that the decree was entered to remedy constitutional violations. Petition at 6-7. But the amended complaint did not allege that the exercise of control by the Department of Correction with respect to the management and treatment of the residents violated a federal right of the residents. Nor did it pray for the relief provided by the decree. There is no record of the hearing before Judge Wyzanski, nor of any findings he may have made concerning the decree. King's motion for summary

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[1] *Williams v. Lesiak*, like *King v. Greenblatt*, is an individual action. In *Williams*, too, the original plaintiff has been discharged from the Treatment Center; however, no resident has intervened in *Williams* as successor to the original plaintiff. Because no one appeared to oppose the defendants' motion in *Williams*, the district court did not act on the motion, and the decree in that case is not before the Court. On June 29, the district court allowed defendants' motion to modify both decrees. The defendants' motion to vacate the decree and dismiss the *Williams* case for want of jurisidiction is pending.

judgment is not in the district court's record (nor that of the respondents). In short, the petitioners' allegation is no more than an optimistic reconstruction of the record based on certain thoroughly ambiguous fragments.

The following appears in the surviving record. Mitchell King commenced this action in February, 1972, approximately a month before Harold Williams commenced *Williams v. Lesiak*. Except for personal details, the allegations and claims in each complaint were identical. Each plaintiff alleged that the Acting Director of the Treatment Center, an employee of the Massachusetts Department of Mental Health, was required by state law "to control the appointed personnel with respect to 'care, treatment, and rehabilitation'" of the residents, but that the defendant allowed Department of Correction personnel complete freedom to decide when and for how long to place residents in solitary confinement. Each petitioner prayed, *inter alia*, for a declaration that solitary confinement "cannot be administered outside the mandate of Section 2 of the Statute [*i.e.*, G.L. c. 123A, § 2]."

District Judge Wyzanski appointed counsel in each case. Counsel in this case filed an amended complaint which refocussed the plaintiff's complaint and dropped his prayer for enforcement of G.L. c. 123A, § 2. Counsel in *Williams*, however, sharpened that plaintiff's complaint regarding violations of § 2 and expressly sought equitable relief "to redress the deprivation of rights, privileges and immunities secured . . . by M.G.L. c. 123A."

The parties in the *Williams* case entered a stipulation in 1972 that contained all of the elements of the "structural" decrees which were to be entered in 1974 in each case. The amended complaint in *Williams* alleged that the division of

functions between the departments was determined by state law and prayed the court to incorporate the parties' stipulation in its final judgment. Instead, of course, the parties settled both cases, and Judge Wyzanski entered the consent decrees within two weeks of each other. The respondents assume that the decree in this case was entered to ensure remedial consistency with *Williams*; as stated above, the remedy provided in the decree was expressly sought in *Williams* but not in this case, and *Williams* requested the structural remedy as matter of state, not federal, law.

The decree in issue provides in material part as follows:

> 1. The Treatment Center at MCI Bridgewater shall be treated as a facility of the Department of Mental Health.
>
> 2. Primary responsibility and authority for the Treatment Center shall be exercised by the Department of Mental Health.
>
> 3. All personnel at the Treatment Center (clinical, custodial, administrative) shall be subject to the control of the Commissioner of Mental Health with respect to the handling of patients.
>
> 4. Custodial personnel, but not patients, shall be under the administrative, operational and disciplinary control of the Commissioner of Correction.
>
> 5. The Department of Mental Health shall exercise the responsibility and authority set forth in subparagraph 2 above so that patients at the Treatment Center should have the least restrictive conditions necessary to achieve the purposes of commitment. . . .

Thus, the decree essentially reiterates G.L. c. 123A, § 2, as it read in 1974.

Parties to this Proceeding.

King v. Greenblatt was not and is not a class action. The sole original plaintiff, Mitchell G. King, was discharged from the Treatment Center in 1975.

The "Intervenor Plaintiffs" were the plaintiffs in *Pearson v. Fair*, C.A. No. 81-3219 (D. Mass.), who brought an action against the defendants alleging violation of the *King* decrees. In the course of that case, the defendants moved to vacate the *King* decrees and the *Pearson* plaintiffs were allowed to intervene in *King* to oppose the motion. *Id.*, slip op. at 168. The *Pearson* plaintiffs contend that their intervention made them parties in *King* for all purposes. The Court of Appeals appears to have accepted that view in *In re Pearson*, 990 F.2d 653, 655, 657 (1st Cir. 1993), incidentally to its decision against the plaintiffs in that case. Of the six original "Intervenor Plaintiffs", only one, Albert Gagne, remains at the Treatment Center. The petitioners identify another resident, Calvin Tate, as an intervenor in *King*, apparently because he intervened in the *Pearson* case. The respondents believe that Mr. Tate did not intervene in *King*.

As stated above, the "Class of 48 + 1" consists of individual residents who are opposed to the defendants' motion to modify the decrees. The residents have not been certified as a class, nor are they parties to the *King* case. Three of these residents, Dennis J. Quintal, Sr., Robert E. Cameron, and Roger A. Gosselin (deceased), are listed in the docket as "interested parties", as are three other residents, Ronald J. DeWolfe, William F. Gonsalves, and Larry Davis. These individual residents have apparently participated in these proceedings on a theory adopted by the district court but not yet reviewed by the Court of Appeals.

In the *Pearson* case, the district court ruled that the residents of the Treatment Center may bring independent actions to enforce the consent decrees in *King* even though they are not parties to the decrees or the action, on the theory that they are third party beneficiaries of the decree. *Pearson v. Fair*, C.A. No. 81-3219, slip op. at 21-22, 89-91 (D. Mass., August 28, 1989). Inasmuch as the action was dismissed on the merits, the defendants did not seek review of that ruling. Because Albert Gagne is presently at the Treatment Center, this Court's jurisdiction is not affected by the question whether nonparty residents of the Treatment Center have standing to oppose modification or vacation of the decrees. *See Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 430 (1976).

Decision on Remand by the District Court.

The Court of Appeals remanded the matter to the district court for further proceedings, retaining its own appellate jurisdiction and directing the district court "to report to this

court when the further proceedings are completed."[2]

On June 29, 1995, Judge Mazzone issued a memorandum and order allowing the defendants' motion to modify the decrees in *King* and *Williams*. *King v. Greenblatt*, C.A. No. 72-788, slip op. at 8-9 (June 29, 1995). The plaintiffs have appealed that order.

Summary.

I. The decision and order of the Court of Appeals does not dispose of the Commonwealth's motion to modify the decrees, but instead remands the matter for further proceedings and directs the district court to report its final action on the motion for further review. Inasmuch as the decision itself does not alter the petitioners' rights under the decrees, and as the ultimate result on the Commonwealth's motion has not been determined, the petition is premature and should be denied.

II. The supremacy of the Constitution and laws of the United States is not contested by the Commonwealth, nor implicated by the decision that a change in State law may, and in this case does, warrant modification of a federal court consent decree pursuant to F.R. Civ. P. Rule 60(b). Nor do the decisions in *Cooper v. Aaron*, 358 U.S. 1 (1958), and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), preclude modification of a decree to accommodate a change in State law.

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[2] This order, which accompanied the decision reproduced in Petition Appendix A, is not itself reproduced in the Appendix.

III. The Court of Appeals did not depart from this Court's decision in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), when it gave weight to considerations of federalism in its determination that a statutory transfer of state functions from one agency to another was a change in law warranting modification of the decrees.

IV. The lower court's observation that the parties to the consent decree could not have agreed to assign responsibility for the Treatment Center to the Department of Mental Health if Massachusetts law had assigned that responsibility to a different agency correctly reflects the extent of the defendants' authority under State law to bind the Commonwealth, given that the petitioners have identified no federal right to have State functions allocated to specific State agencies.

V. The decision will not discourage plaintiffs from settling litigation concerning public institutions, since it does not make consent decrees any less secure than litigated decrees.

Reasons for Denying the Petition.

Rule 10 emphasizes that review by certiorari "is not a matter of right, but of judicial discretion," which "will be granted only when there are special and important reasons therefor." The question is whether the petition presents a case of "such gravity and general importance" as to warrant full court review. *In re Woods*, 143 U.S. 202, 206 (1892). For the reasons stated below, the petition does not satisfy the criteria guiding the Court's exercise of its discretion to review a case. Accordingly, the petition should be denied.

I. THE PETITION IS PREMATURE

The decision of the Court of Appeals does not conclude proceedings on the Respondents' motion to modify the decrees. The case was remanded to the district court to determine whether the respondents have satisfied the second part of the analysis laid out in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383-84 (1992). The Court of Appeals retained appellate jurisdiction and directed the District Court to report "when the further proceedings are completed." Thus, of itself the decision below does not alter the decrees or the rights of the petitioners, nor determine whether the respondents are entitled to relief under *Rufo*, and the Court of Appeals itself has retained its jurisdiction to see the question through to the finish.

To be sure, the district court has now determined that the decrees should be modified as requested. However, that decision is subject to review by the Court of Appeals (and the petitioners have appealed). The Court of Appeals may still rule for the petitioners, thereby mooting the present proceeding. Or, the Court of Appeals may decide the second appeal in such a way as to raise additional questions for review by this Court.

Although this Court's jurisdiction does not require that the decision below be final in a strict sense, the petition simply fails to identify any interest requiring review before the Court of Appeals has finally ruled upon the district court's decision on the second branch of the *Rufo* test — despite the Court of Appeals' retention of jurisdiction and direction to the district court that it report its action on remand — much less an imperative public interest, *cf.* Supreme Court Rule 11. For

that reason, the petition should be denied.

II. The Decision Raises No Issue Under the Supremacy Clause.

The petitioners allege that the decision is in conflict with two decisions of this Court, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 695 (1979), and *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), in that it permits state law to thwart a federal decree.

There is no conflict. As stated by the Court of Appeals, when the Act transferring authority over the Treatment Center was signed by the Governor, the defendants "immediately moved under Fed. R. Civ. P. 60(b)(5) to modify the decree so that DOC might assume plenary authority over the Treatment Center, subject to all other substantive and procedural requirements of the decree." App. 4. Pending allowance of the motion, the defendants acknowledged their duty to comply with the decrees, and arranged legislative authorization for a temporary agreement under which the Department of Mental Health continued to exercise its former authority over the Treatment Center. That arrangement has continued in effect ever since, although in view of the district court's recent decision the arrangement will shortly be concluded.

The Court of Appeals well recognized that the defendants' motion was directed to the court's discretion, acknowledging its power. The heart of the decision is devoted to assessing the degree of the conflict between the statute and the constitutional rights which the decrees were assumed to have been intended

to vindicate.[3] The court envisioned a spectrum of cases:

> Of course, if the terms at issue were directly *mandated* by the Constitution, a change in state law without more would not warrant a modification. Modifiable terms will typically fall somewhere along a spectrum: in general, terms that directly implement constitutional requirements . . . will be more closely related to the vindication of a constitutional right than terms that lay the groundwork for other remedial measures.
>
> We think that the structural terms in this case belong in the latter class. . . .

App. 8. Even within the realm of "modifiable terms" the court applied a further "'case-specific inquiry' into both the decree and the statute 'to discover whether their objectives and provisions necessarily conflict and to consider the importance of the areas of conflict to the overall goals of the litigation.'" App. 9.[4]

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[3] As set forth in the respondents' statement of the case, *supra* pages 3-6, there is substantial evidence in the record that the initial, "structural" decrees in the *King* and *Williams* cases were entered to enforce state law. Since the record is not conclusive either way, the defendants have assumed for the purpose of their motion that the "structural" decrees "arguably relate[] to the vindication of a constitutional right," *see Rufo*, 502 U.S. at 383 n.7. App. 8.

[4] The Treatment Center has operated under the regime of the decrees for 21 years. The division of responsibilities between the two agencies has been a fertile source of litigation by the residents for many years, culminating in the district court's epic decision in the *Pearson* case. Not only the defendants and the Massachusetts

In sum, the Court of Appeals did not hold, contrary to *Cooper,* that the change in state law *ex proprio vigore* modified the decrees, or that it justified a refusal by the defendants to abide by the decrees. Rather, the court held that in the circumstances the change was significant and warranted the district court in exercising its discretion to modify the decrees, so that state law might be implemented. That holding in no way conflicts with this Court's decisions in the *Washington* and *Cooper* cases, and is fully consistent with Rule 60(b)(5) of the Rules of Civil Procedure.

III. THE DECISION DOES NOT CONFLICT WITH THIS COURT'S DECISION IN RUFO.

The petitioners claim that the decision conflicts with this Court's decision in *Rufo* in that the Court of Appeals considered federalism interests in connection with its determination that the statute represented a significant change in circumstance warranting modification of the decrees. The argument simply misreads the *Rufo* decision.

The petitioners rely on footnote 14 of the *Rufo* opinion, in which the Court said that with regard to the "threshold inquiry" whether there has been a significant change in circumstance warranting modification, "no deference is involved." 502 U.S. at 392 n.14. Petitioners apparently

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legislature, but also Judge Mazzone concluded that the situation was "unworkable." App. 9-10, 42. The Court of Appeals thus concluded that the legislative plan to consolidate responsibility in one agency was not necessarily in conflict with the goals of the litigation. App. 9-10.

confuse concern for federalism with deference to local officials. The allocation of authority and responsibility between the States and the national government and the restoration of democratic control of public institutions are not merely local concerns; they are constitutional considerations affecting the scope of the district court's remedial authority. *See, e.g., Board of Education v. Dowell*, 498 U.S. 237, 247 (1991); *Rizzo v. Goode*, 423 U.S. 362, 379 (1976). As the court below noted, *Rufo* itself emphasizes the importance of flexibility in institutional reform litigation:

> [T]he public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions."

502 U.S. at 383, *quoting Heath v. DeCourcy*, 888 F.2d 1105, 1109 (6th Cir. 1989).

The "federalism concerns" referenced by the Court of Appeals were, on the one hand, the consideration that the structural provisions of the decree were not mandated by the Constitution and were possible only by virtue of State law as it existed when the decree was entered and, on the other hand, the consideration that the Legislature had amended the law to eliminate the authority of the Department of Mental Health over the Treatment Center, so that its continued role was wholly dependent upon the decree and thus upon federal rather than State authority. App. 10. In giving weight to these concerns, the Court of Appeals did not defer to local opinion; rather, it recognized that the change in State law made the

decree's requirement that the Department of Mental Health bear responsibility for the custody, care and treatment of the residents "no longer equitable." F.R. Civ. P. 60(b)(5). Because this assessment is not inconsistent with *Rufo*, the petition should be denied.

IV. THE DECISION DOES NOT MISAPPREHEND THIS COURT'S DECISIONS REGARDING THE SCOPE OF THE FEDERAL REMEDIAL AUTHORITY.

The petitioners argue that the Court of Appeals erred in its observation that the decree could only allocate responsibility for the Treatment Center to the Department of Mental Health because State law already did so. App. 8, 10. Petitioners cite no case supporting their extreme propositions that a federal court could order a state agency with no statutory authority to take over the management and operation of a state facility, or that state officials could enter a binding and enforceable agreement so restructuring state government without statutory authority. With regard to the first proposition, petitioners cite cases holding that the federal courts may order state agencies to implement procedures required by the federal constitution or laws — a point far removed from the proposition that the courts may allocate responsibility for state functions among state agencies regardless of state law. Even the petitioners have not argued that the Constitution mandates the Massachusetts Department of Mental Health to manage the Treatment Center.

With regard to the second proposition, petitioners cite cases holding that parties to a consent decree may agree to relief beyond what a court might order. Petition at 18, *citing Rufo*,

502 U.S. at 389, *Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992), *and Local Number 93, Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986). But again, that point is quite different from the proposition that public officials may make binding agreements to restructure State government even though they are unauthorized by State law to do so.[5] As stated in *Evans v. City of Chicago*, 10 F.3d 474, 478 (7th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1831 (1994), "[T]emporary officeholders may not contract away the basic powers of government to enact laws . . . in the same way natural persons may make enduring promises about their own future behavior. . . ."

Thus, petitioners do not demonstrate that this observation by the Court of Appeals is in conflict with this Court's decisions or with the decisions of another circuit. In any event, though, the point does not play an important role in the decision. After all, the court ruled that the change in state law was a change in circumstance warranting modification, not that the change could be implemented without modification of the decree.[6] Accordingly, the petition should be denied.

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[5] Under state law, "Officers of governmental agencies have authority to bind their governmental bodies only to the extent conferred by the controlling statute." *Boston v. Back Bay Cultural Association, Inc.*, 418 Mass. 175, 184, 635 N.E.2d 1175, 1180 (1994).

[6] The respondents argued that no conflict existed between the decree and state law because the decree could not be construed to preclude the legislative reallocation of responsibility for the Treatment Center, inasmuch as the respondents (or their predecessors) had no authority to enter such an agreement. The Court of Appeals

V. The Decision Does Not Discourage Settlement of Litigation.

Petitioners finally urge that the decision will have a "chilling effect" on the settlement of litigation by consent decree. This is so, they argue, because the decision allows public officials to avoid their obligations by enacting contrary legislation. The claim is certainly not proven by this case. These petitioners played no role in the negotiation of the consent decree; they are free riders.[7] The decision does not alter the substantive provisions of the decrees, which have governed many aspects of the Treatment Center now for 21 years; the Department of Correction will step into the shoes of the Department of Mental Health, and so will be bound by those provisions.[8]

Furthermore, the decision does not hold that public officials may avoid their obligations under a decree by changing the law. Rather, it holds that a change in the law, particularly a

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did not adopt this "contract interpretation" approach, but treated the case as one in which a change in state law created a conflict with a valid and enforceable decree.

[7] Even if the petitioners were in a position to claim the "benefit of their bargain," it simply is not plausible to claim that the bargain included a perpetual assignment of responsibility for the Treatment Center to the Department of Mental Health which would be irrevocable even by the Legislature. "[T]emporary officeholders may not contract away the basic powers of government to enact laws . . . ." *Evans v. City of Chicago*, 10 F.3d at 478.

[8] The defendants' motion to vacate the decrees in this case and the *Williams* case is pending in the district court.

change in the law upon which a provision of the decree is grounded, may constitute a change in circumstance warranting modification of the decree. Under the decision, the question is still one to be decided on a "nuanced, case-specific approach" — an approach sufficiently refined to permit the court to distinguish legislative initiatives which frustrate the court's remedial authority.

Finally, the argument that the decision will discourage the settlement of actions by consent decree presupposes that a litigated judgment would be more permanent that a consent decree, and would provide an equivalent remedy. Neither supposition is so. A litigated judgment is subject to modification under Rule 60(b) at least as readily as a consent decree,[9] and consent decrees often include terms which a court could not order directly. For example, it is difficult to imagine circumstances in which the structural terms of the *King* decree would be warranted as a matter of federal right.

In short, for the reasons stated by this Court in *Rufo*, there is no merit to the argument that a flexible approach to modification of consent decrees which recognizes that changes in state law may warrant modification of a federal decree will discourage the settlement of civil rights actions.

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[9] Indeed, it may be more easily amended since it is not supported by an agreement between the parties and so must be related more closely to federal law.

Conclusion.

The petition for a writ of certiorari to review the judgment of the Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

Scott Harshbarger
Attorney General
of Massachusetts
WILLIAM L. PARDEE

Assistant Attorney General
200 Portland Street, 3d floor
Boston, MA 02114
(617) 727-2200, ext. 3353

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